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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES GREGORY SMITH,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ROBERT SHINGLE SPEIR,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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139 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Rule 41 of the Federal Rules of Criminal Procedure, Title 18, United States Code, authorizes the issuance of a search warrant upon the sworn affidavit of an investigator of the Texas Department of Public Safety?

Whether an affidavit containing insufficient assertions of personal knowledge from the "cooperating individual", unsupported conclusions of the affiant; no corroboration of the meager information received; and no showing of why the cooperating individual is credible or his information reliable (and not even such a claim), is sufficient to establish probable cause for the issuance of a search warrant (or order authorizing installation of an electronic tracking device) under the "totality of circumstances" test of Illinois v. Gates?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH

The Petitioners, JAMES GREGORY SMITH and ROBERT SHINGLE SPEIR, respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals affirming their convictions and the denial of the motion for rehearing entered December 8, 1983 and January 5, 1984, respectfully.

OPINIONS BELOW

The Court of Appeals entered its Memorandum affirming the convictions on December 8, 1983 (unreported), and denied their motion for rehearing January 5, 1984. A copy of each opinion is attached hereto as Appendix A and B.

JURISDICTION

Petitioner's convictions on four counts of a five count indictment charging conspiracy to : import marijuana in violation of Secs. 952(a) and 960 of Title 21, United States Code (USC); transport hazardous material (gasoline) in air commerce in violation of Sec. 1472(h), Title 49 USC and 49 CFR Sec. 173.119; possess with intent to distribute marijuana in violation of Sec. 841(a)(1), Title 21 USC; carry a firearm during the commission of a felony offense, to-wit: smuggling marijuana, in violation of Title 18, USC, Sec. 924(c). Count two charged the importation of marijuana in violation of Title 21, USC, Secs. 952(a) and 960. Count three charged transportation of a hazardous material in air commerce in violation of Chapter 20 of the Federal Aviation Program and Title 49, USC, Sec. 1472(h) and 49 CFR Sec. 173.119. Count four charged possession of marijuana with intent to distribute in violation of Title 21, USC, Sec. 841(a)(1).

The jurisdiction of this Court is invoked under Title 28, USC, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV. (See Appendix)

STATORY PROVISIONS INVOLVED

Title 18, U.S.C. Sec. 924(c) and Rule 41, Federal Rules of Criminal Procedure; Title 21, U.S.C. Secs. 841(a)(1), 952(a), 960; Title 49, U.S.C. Secs. 1472(h), 1801, 1802, 1803, 1804, 1806, 1808, 1809; Title 49, Code of Federal Regulations, Sec. 173.119; Chapter 20, Federal Aviation Program. (See Appendix)

STATEMENT OF THE CASE

On September 13, 1982 a two count information was filed in the United States District Court for the Eastern District of Texas. A superseding indictment containing five counts was filed September 29, 1982. Count 1 charged conspiracy; to import marijuana in violation of Secs. 952(a) and 960 of Title 21, U.S.C.; transporting hazardous material (gasoline) in air commerce in violation of Sec. 1472(h), Title 49 U.S.C. and 49 CFR Sec. 173.119; to possess with intent to distribute marijuana in violation of Sec. 841(a)(1), Title 21 U.S.C.; to carry a firearm during the commission of a felony offense, to-wit: smuggling marijuana in violation of Sec. 924(c), Title 18 U.S.C. Count 2 charged the importation of marijuana in violation of Secs. 952 (a) and 960, Title 21. Count 3 charged transportation of a hazardous material in air commerce in violation of Chapter 20 of the Federal Aviation Program and Title 49, U.S.C., Sec. 1472(h) and 49 CFR Sec. 173.119. Count 4 charged possession of marijuana with intent to distribute in violation of Title 21, U.S.C., Sec. 841(a)(1) (R.4, U.S.A. v. Smith). Count 5 was dismissed (R.52, U.S.A. v. Smith), and need not be considered here. Petitioners waived their right to trial by jury (R.29, U.S.A. v. Smith, R.10, U.S.A. v. Speir), and

entered into a stipulation with the government attorney (R.40, U.S.A. v. Smith) in which the facts surrounding the order for installation of the electronic tracking device and subsequent events leading to the arrest of Petitioners and the ensuing search of their aircraft. Paragraph 10 of the stipulation provides: "That the contraband made the subject of the indictments herein, and all evidence offered in support of the Government's cases, was seized and obtained as a result of the search made pursuant to the Order referred to in paragraph 6, above (order authorizing installation of a tracking device in Petitioners airplane)". Petitioners entered their pleas of not guilty and the Trial Court made its Findings of the Court (R.53, U.S.A. v. Smith), and entered judgment and assessed punishment at five years on each of the four counts remaining before the Court, to run concurrently, and with a special parole term of two years (R.59, U.S.A. v. Smith). Notice of appeal was timely given (R.60, U.S.A. v. Smith, R.22, U.S.A. v. Spein).

FACTS

Petitioners were arrested May 18, 1982 at the Upshur County Airport in Gilmer, Texas. At the time of their arrest, approximately 900 pounds of marijuana was seized, along with evidence of other crimes for which Petitioners were subsequently charged.

The aircraft which Petitioner Smith was piloting when arrested had been the subject of a court order issued May 17, 1982, by Houston Abel, United States Magistrate for the Eastern District of Texas. The order authorized the entry of the aircraft for the installation of a tracking device. The following day the aircraft, with the tracking device operating, was detected by a remote automatic sensing device at Port Isabel, Texas (UBAS). Information was automatically relayed to Sector Center, United States Customs in Houston, Texas, and printed out on a paper tape. The monitoring disclosed the aircraft traveling on a southerly bearing for approximately 37 minutes before turning east, then north.

A Customs aircraft from the Kingsville Naval Air Station was one of the airplanes sent to intercept the aircraft detected by the monitoring. Customs Officer Alexander was part of the crew. He had equipment he used to detect the tracking device placed in the suspect aircraft. While he was attempting to intercept the suspect aircraft, his instruments indicated the suspect aircraft passed in front of him going in a northerly direction. Relying upon the instruments, he followed the aircraft until it landed at the Upshur County Airport in Gilmer, Texas. As the aircraft put on its landing lights for a final approach, Alexander was able to visually observe the aircraft, which, according to his instruments, he had been tracking from a point 40 miles in the Gulf of Mexico to Gilmer.

The Customs officers, officers from the Texas Department of Public Safety, Police Department of Gilmer and the Upshur County Sheriff's Office were present at the airport. When the plane landed one man was seen leaving the aircraft in a van or pickup truck. As the officers approached the aircraft another man was close to it. A strong odor of marijuana was detected by the officers. One of the chase planes landed and the aircraft was identified as the one tracked by Alexander. Petitioners were arrested at that time (R.12-15, U.S.A. v. Smith).

Petitioners filed their motion to suppress evidence (R.31, U.S.A. v. Smith, R.12, U.S.A. v. Speir), and a memorandum of law in support of the motion to suppress evidence was also filed (R.34, U.S.A. v. Smith). After a consolidated hearing the motions were denied (R.33, U.S.A. v. Smith, R.14, U.S.A. v. Speir). The motions challenged the legality of the warrantless arrest, search and seizure, which was made upon information obtained as a direct result of utilizing the tracking device placed inside the aircraft under authority of the order issued by the Magistrate. The memorandum discussed the affidavit upon which the installation order was issued as being insufficient to establish probable cause.

REASONS FOR GRANTING THE WRIT

The affidavit upon which the Magistrate's Order was issued is void on its face because the affiant is not one who is authorized to seek such an order.

Rule 41, F.R.Cr.Proc., Title 18 U.S.C., sets forth the procedure for obtaining warrants to search. This rule authorizes the issuance of a search warrant, but only "upon request of a federal law enforcement officer or an attorney for the government." Paragraph 1 of the affidavit (R.45, U.S.A. v. Smith), clearly identifies the affiant as a narcotics investigator with the Texas Department of Public Safety. He makes no claim that he also has duties as a federal law enforcement officer or an attorney for the government.

Under the rules of statutory construction, when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode and the courts should not expand the coverage of the statute to subsume other modes. **Rogers v. Frito-Lay, Inc.**, 611 F.2d 1074, 1084-1085 (5th Cir. 1980). By specifying two distinct classes of persons authorized to submit affidavits for search warrants, all others are excluded. The Magistrate was not authorized to consider the affidavit or to issue an order thereon.

The Trial Court erred in not granting the motion to suppress and the Court of Appeals erred in not reversing the judgments of convictions.

The affidavit upon which the order authorizing the installation of the tracking device was issued states:

> "TERRY W. LANKFORD, being first duly sworn, deposes and says:
>
> 1. That I am a Narcotics Investigator with the Texas Department of Public Safety assigned to Corpus Christi, Texas. I have been so employed as a narcotics investigator since January 1, 1980. My duties as a narcotics investigator include the detection, identification and apprehension of narcotics

smuggling violators and narcotic smuggling organizations who utilize aircraft to facilitate their smuggling activities. I have received specialized training in these types of investigations.

"2. The affiant alleges that there is probable cause to believe that aircraft bearing FAA number N4081L, a twin engine Piper aircraft, serial number PA31-8112038, being white with yellow, orange and brown stripes will be utilized to commit offenses as defined in 19 U.S. Code, Sections 1459 and 1460; being violations arising from the failure to report and manifest goods imported into the United States and 18 U.S. Code, Section 545; being violations arising from bring into the United States any merchandise contrary to Law and 21 U.S. Code, Sections 952, 846 and 841(a)(1); being violations arising out of the smuggling and possession with intent to distribute controlled substances into and within the United States.

"3. The affiant states that **the facts which establish probable cause** necessary for the issuance of an order authorizing the installation and utilization of electronic aircraft tracking equipment in the above captioned aircraft **is as follows:**

A. On 5-16-82, affiant received information from a cooperating individual that a Piper Navaho aircraft, N4081L, had arrived at Chaparral Aviation at the Corpus Christi International Airport on 5-15-82 at approximately 10:00 pm. The above mentioned aircraft was in need of fuel and upon arrival was occupied by two (2) white males. One (1) of the subjects was later identified as James Gregory Smith. The cooperating individual informed the affiant that Smith and the other occupant of the aircraft wanted to purchase fuel for the above described aircraft and upon being advised that they would have to wait until the next date for fuel Smith

and the unidentified subject left the airport on foot and walked toward the main airport terminal.

B. The affiant was informed by a cooperating individual that on 05-16-82, at approximately 5:30 am, Smith and the same unidentified subject returned to Chaparral Aviation for the purpose of having the above mentioned aircraft refueled. The cooperating individual, while refueling the aircraft observed that all of the seats had been removed from the aircraft with the exception of the pilot and co-pilot seats. Removing the rear seats from an aircraft to be utilized in a narcotic smuggling operation is very common in that the payload, or total cargo capacity is increased to a maximum. The cooperating individual further informed the affiant that while refueling the aircraft, he was requested by Smith to assist him (Smith) in fueling a two hundred (200) gallon auxiliary fuel cell which was located in the floor of the main cabin of the aircraft. Smith was inside the aircraft and requested that the cooperating individual remain outside the aircraft and assist him (Smith) by holding a ventilating hose, which was connected to the utility fuel cell. The carrying of extra fuel onboard an aircraft is a felony in direct violation of Title 49, U.S.C. Section 1803 and 1809, which prohibits the transportation of hazardous materials onboard an aircraft. This method of carrying auxiliary fuel on an aircraft to be used in a smuggling operation is very common in that it enables the aircraft to be flown to such locations as Central and South America and return to the United States without a need for refueling. Based on experience as a narcotics investigator, the affiant knows that Central and South America are the most popular locations for smugglers to purchase their narcotics.

C. The affiant inquired with the Federal Aviation Administration in Oklahoma City and learned that Piper Navajo, N4081L, was purchased on 01-19-82 in the name of C.V. Aviation, 2311 Federal Avenue, Seattle, Washington. Information received indicates that C.V. Aviation is owned by Carl M. Gritzmaker and Vern L. Raburn. No current intelligence data exists on Gritzmaker or Raburn at the present time.

D. Suspect James Gregory Smith is known to the Affiant to be a documented narcotics smuggler who utilizes aircraft in his (Smith's) smuggling operation. Smith is currently the target of a separate investigation being conducted by the Texas Department of Public Safety, Narcotics Service in Corpus Christi, Texas. The Affiant learned through his separate investigation that Smith is the owner of a twin engine Beechcraft Queen Air, N36S and he (Smith) is currently having an aircraft hangar constructed at the Aransas County Airport in Rockport, Texas. Smith stated to a cooperating individual that the reason for having the hangar built in Aransas county and not in Corpus Christi (Smith's residence) is because there are too many "Feds" (federal agents) in the Corpus Christi, Texas area.

E. The Affiant also learned through a cooperating individual that Smith has been presenting himself as a "high roller". Smith elaborated further as having associates in Nevada and Florida and that he (Smith) was accustomed to paying large sums of money "under the table" in order to get what he (Smith) wants.

F. The Affiant learned that all work performed on Beechcraft aircraft, N36S, while at the Aransas County Airport was done in the name of Magnum Aviation, Inc. The Affiant overheard Smith tell the employees at Chaparral Aviation on

05-16-82 that he (Smith) is the owner of Magnum Aviation, Inc., located at 710 Buffalo Street, in Corpus Christi, Texas. As a result of investigation conducted on Smith by the Texas Department of Public Safety, Narcotics Service as previously mentioned herein, it was learned from the Texas Secretary of State, Corporation Division, that Magnum Aviation Inc. is not currently or properly registered as a corporation to conduct business as such. Corporation Division records reflect that Magnum Aviation, Inc. has filed for "name reservation" as of February 18, 1982. The Affiant also learned that the Assumed Names Division of the Nueces County District Clerk's office in Corpus Christi, Texas has no such business as Magnum Aviation registered as doing legitimate business in Corpus Christi. The Affiant also learned that the local address associated with Magnum Aviation, 710 Buffalo Street, is actually the address of Magnum Tools and not that of Magnum Aviation. An inquiry was made with Magnum Tools at the above address and it was learned that Magnum Tools is in no way affiliated with Magnum Aviation. As a result of the above mentioned checks conducted by this office, the Affiant believes that Magnum Aviation is not a legitimate business and it actually a "front" for Smith in his smuggling operation. The practice of utilizing a ficticious company name is common to narcotic smuggling violators in that it is a method by which they (suspects) can keep their true names and affiliations secret from the authorities.

G. On 05-16-82 at approximately 5:15 pm Smith and the above mentioned unidentified white male departed Chaparral Aviation in the Piper aircraft, N4081L, filing a flight plan and giving their destination as Winnsboro, Texas. Prior to departing the airport the above mentioned

unidentified white male was overheard by the Affiant checking the weather conditions for a flight to St. Thomas in the Virgin Islands. This is significant in that it shows an intent by the pilot to make an overseas flight. Surveillance units were sent to the Winnsboro, Texas airport in an attempt to locate the Piper aircraft, N4081L, and although they were unable to locate the aircraft they did locate a 1979 Ford pick up, 1982 Texas NB 4960, which is registered to James G. Smith, Box 10, Leesburg, Texas. When the aircraft failed to arrive at the Winnsboro, Texas airport Texas Ranger B. Foster checked several airstrips and airports in the area and at approximately 10:15 pm Ranger Foster located the Piper aircraft N4081L, at the Mount Pleasant, Texas airport.

WHEREFORE, Affiant believes that probable cause exists to believe that the aforementioned and described Piper aircraft, N4081L, is going to be utilized to commit offenses against the laws of the United States of America as defined in paragraph two (2) of this document and that conventional methods of investigation have failed in the past and/or are likely to fail in the future in the detection and apprehension of said type smuggling endeavor, and that the installation of electronic tracing devices in said aircraft, N4081L, will result in the detection of the aircraft from foreign territories into the United States resulting the seizure of Controlled Substances pursuant to statutes cited in this Affidavit. The electronic tracking device to be installed, maintained and utilized is known as a transponder or a beeper or both and such installation shall be performed by a qualified officer of the U.S. Customs Service Air Branch and/or electronic technicians of the U.S. Customs Service, Department of Treasury and shall be in accordance with

Federal Aviation Administration procedures. Furthermore, this electronic tracking device will in no way impair or affect the safe operation of said aircraft, to include flight performance, navigation or any other aspect of safe flight. The success of this investigation depends upon this Affidavit, Application and Order being kept secret. Therefore, it is additionally requested that this Affidavit, Application and Order be sealed by the Court. It is further requested that the United States Customs Service Officers and Employees be authorized to enter private premises and/or buildings which may house aircraft N4081L for the purpose of said installation and maintenance and that it may be accomplished during the day or night time hours as circumstances dictate.

s/ Terry W. Lankford
Affiant: Terry W. Lankford
Texas Department of Public Safety"

The affidavit in support of the application for the order (U.S.A. v. Smith, R-45-48), contains two paragraphs with statements directly attributed to the cooperating individual. Paragraph 3A states that the cooperating individual stated that on May 15, 1982, a certain described aircraft arrived at the Corpus Christi International Airport at approximately 10:00 pm., and the plane was occupied by two men, later identified as Petitioners, who wanted to buy fuel. Paragraph 3B states that the cooperating individual said the two men returned the following morning for the purpose of purchasing fuel and while refueling the aircraft was requested by Petitioner Smith to assist in fueling a two hundred gallon auxiliary fuel cell. The other statements contained in both paragraphs are merely conclusions of the affiant, without an assertion of personal knowledge or being directly attributed to the cooperating individual. Only one other statement is directly attributed to the cooperating individual. That is found in paragraph

3E, and is more of a conclusion that Petitioner "Smith has been presenting himself as a 'high roller' ".

The remainder of the affidavit is merely conclusions of the affiant as to what his "investigation" revealed about the Petitioners and his conclusion as to what other "investigations" had revealed. There is no assertion of reliability by the affiant for the cooperating individual and in fact the affiant does not even state that he believes the meager information directly attributed to the cooperating individual. There is no statement concerning an attempt to corroborate the meager information received.

Considering the "totality of the circumstances" rule of **Illinois v. Gates,** 103 S.Ct. 2317 (1983), the information directly attributed to the cooperating individual and the conclusions reached by the affiant may be sufficient to create a reasonable suspicion that the Petitioners may have been preparing to make an illegal flight for the purpose of importing drugs. However, the reasonable suspicion rule is **not** a substitute for probable cause for issuance of a warrant. **United States v. Butts,** 712 F.2d -139, 1149 (5th Cir.1983).

The affiant erroneously and misleadingly states "(t)he carrying of fuel onboard an aircraft is a felony in direct violation of Title 49, U.S.C. Section 1803 and 1809, which prohibits transportation of hazardous materials on board an aircraft." However, a reading of sections 1801 through 1809 reveals otherwise. The carrying of fuel in auxiliary cells in an aircraft is **not** clearly a "direct violation" of the United States Code. It is only **if** no exemption has been granted (Sec. 1806), **if** the transportation is in "commerce" (Sec. 1801, 1802), and **if** the Secretary has issued a "notice" and provided an "opportunity for a hearing", resulting in the issuance of orders directing compliance with the chapter or regulations (Sec. 18.08) that a violation can be said to have occurred. **Only then** is the Attorney General authorized to petition the district courts for enforcement of such orders issued by the Secretary (Sec. 1808). Until the terms and conditions of the statutes have been met, an observation by an individual who does not have knowledge of all the facts of the particular incident simply cannot determine if a violation of the statutes

has occurred. The affiant does not contend that he had such knowledge, which he could have easily obtained. He only makes a patently conclusory statement that the statutes have been violated without stating the facts upon which his conclusion is based.

The affiant's conclusion that the act of carrying extra fuel on an aircraft is very common in smuggling operations would equally apply to any legitimate overseas flight or any flight to a remote area where refueling would otherwise be impossible. It cannot be assumed, without evidence, that auxiliary fuel cells are manufactured for the sole (or primary) purpose of providing drug smugglers a method of carrying extra fuel for their flights.

Since the Secretary of Transportation is authorized to exempt and approve the transportation of hazardous materials, considered in light of the presumption that "(i)n absence of testimony to the contrary, it is always to be inferred that parties have acted within the scope of their legitimate authority, and it will never be presumed that they have violated the law when the reverse is equally consistent with the facts disclosed", **Town of Highland Park** v. **Marshall,** 235 S.W.2d 658,664 (Tex.Civ.App.1950), it should have been presumed that the Secretary had approved the installation and use of the auxiliary fuel cell in the aircraft.

The conclusory allegations regarding Petitioner Smith being a "high roller", ownership of other aircraft and dummy corporations are obviously intended to "bootstrap" the meager facts provided to convince the magistrate that Petitioners were "bad guys" who needed watching. However, the same allegations could be made to countless numbers of legitimate businessmen, playboys, doctors, lawyers and other professional people, who openly are big spenders, own airplanes and enjoy the financial anonymity of holding companies, limited partnerships and the like. There is no factual basis shown in the affidavit to support the affiant's conclusions — no allegations of indictments, convictions or even specific offenses — just etheral "investigations".

The Fourth Amendment to the United States Constitution guarantees that "no Warrant shall issue, but upon probable cause," supported by oath or affirmation. The requirement was not eliminated by the decision in **Illinois** v. **Gates,** 103 S.Ct. 2317 (1983). "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." And the courts are required to continue to "conscientiously review the sufficiency of affidavits on which warrants are issued." 103 S.Ct. at 2332.

In **United States** v. **Kolodziej,** 712 F.2d 975 (5th Cir. 1983), the Court considered the modified showing of probable cause under **Illinois** v. **Gates,** supra. It was pointed out that **both** the informant's reliability and basis of knowledge no longer have to be set forth in an affidavit because under **Gates** "a deficiency in one may be compensated for, in determining the overall reliability of a tip, **by a strong showing as to the other,** or by some other indicia of reliability." The affidavit there was found to be insufficient because there was no basis of knowledge set forth; no affirmative allegation of reliability; and there was no corroboration of the informant's tip. 712 F.2d at 977.

In **United States** v. **Butts,** 710 F.2d 1139,1150(5th Cir.1983) the Court specifically held that a warrant is necessary, not only for the entry into the vehicle and the physical attachment of the beeper in it's interior, but also for its continued presence for a period of time therein.

> "Accordingly, we hold that in the usual case a warrant based upon probable cause is required to install and maintain an electronic tracking device within the interior of a vehicle or other conveyance for an extended period of time. The fourth amendment demands nothing less." 710 F.2d at 1150

The panel did not reach the question of whether and under that condition various exceptions to the warrant requirement would apply. 710 F.2d at 1150 n.16. Surely, this case

is not one of those exceptions because the arresting officer thought he did need an order and obtained one, and there are no exigent circumstances shown by the affidavit.

The affidavit fails to meet the modified showing of probable cause under **Illinois** v. **Gates,** supra. It does not even contain an assertion that the cooperating individual is reliable or that the affiant believes it to be credible. The information is not of such a nature that it can be said the cooperating individual could have only obtained his information from Petitioners or someone who knew their plans. And last, there is no corroboration of the meager information provided by the cooperating individual. The order authorizing installation of the beeper was not based upon probable cause, but was merely a "ratification of the bare conclusions of others", which was denounced in **Illinois** v. **Gates,** 103 S.Ct. at 2332.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners, James Gregory Smith and Robert Shingle Speir, respectfully requests that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit and to enunciate further the application of the "totality of circumstances" tests for establishing probable cause for the issuance of search warrants.

Respectfully submitted,

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Attorney for Petitioner,
James Gregory Smith

Clifton L. Holmes
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214-758-2200

Attorney for Petitioner,
Robert Shingle Speir

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion for rehearing has been served by placing the same in the U.S. Mail, postage prepaid, and addressed to:

Dane Smith, United States Attorney
221 West Ferguson Street
Tyler, Texas 75702

on this 3 day of March, 1984.

DON ERVIN

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES, OF AMERICA, Plaintiff-Appellee,	)	
versus	)	No. 83-2330
JAMES GREGORY SMITH, Defendant-Appellant.	)	
versus	)	No. 83-2332
ROBERT SHINGLE SPEIR, Defendant-Appellant.	)	

Appeals from the United States District Court for the Eastern District of Texas

(DECEMBER 8, 1983)

Before CLARK, Chief Judge, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM:

The affidavit is sufficient. The search warrant was validly issued. The judgment of conviction is

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
versus	)	No. 83-2330
JAMES GREGORY SMITH, Defendant-Appellant.	)	
versus	)	No. 83-2332
ROBERT SHINGLE SPEIR, Defendant-Appellant.	)	

Appeals from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING
(JANUARY 5, 1984)

Before CLARK, Chief Judge, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

DENIED

ENTERED FOR THE COURT

Charles Clark
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	
	)	
JAMES GREGORY SMITH,	)	NO. TX-82-18-CR
and	)	
ROBERT SHINGLE SPEIR	)	NO. TX-82-19-CR

FINDINGS OF THE COURT

On September 29, 1982, James Gregory Smith and Robert Shingle Speir, defendants in the above entitled and numbered consolidated causes, were charged by identical superseding indictments with violations of certain federal criminal statutes. Specifically, Count 2 of the indictments charged the defendants with importing a controlled substance in violation of 18 U.S.C. §§952(a) and 960 (1976). The elements required to be proven to establish this offense are that: (a) the defendant imported or caused to be imported into the United States from any place outside thereof, (b) a controlled substance and (c) that such importation was knowlingly and intentionally done.

Count 3 of the indictments charged the defendants with transporting hazardous materials (gasoline in air commerce in violation of 49 U.S.C. §1472(h) (1976). The elements of that offense are: (a) that a defendant recklessly causes the transportation of any shipment, baggage, or other property which contains a hazardous substance, (b) that such transportation be in violation of any rule, regulation or requirement with respect to the transportation of hazardous materials (the pertinent regulation in this cause is 49 C.F.R. §173.119) and (c) that such transportation be in air commerce.

The defendants are charged in Count 4 of the indictments with possessing, with intent to distribute, a Schedule I Controlled Substance (marijuana), a violation of 21 U.S.C. §841(a)(1)(1976). "The crime of possession of [a scheduled controlled substance] with intent to distribute is comprised of three elements: (a) possession, (b) knowledge and (c) intent to distribute." **United States v. Dreyfus-DeCampos,** 698 F.2d 227 (5th Cir. 1983).

Lastly, Count 1 of the indictments charge the defendants with a conspiracy to commit the offenses contained in Counts 2, 3 and 4 of the indictments; such offenses having been outlined above. Count 4 sets forth various overt acts alleged to be attributable to the defendants committed in furtherance of, and to effect the objects of the conspiracy. The Government had also charged the defendants with a conspiracy to violate 18 U.S.C. §924(c) (1976) in Count 1 and with actual violation of that statute in Count 5 of the indictments; however before trial the prosecution moved for a dismissal of Count 5, which the Court granted. Therefore, the Court will not consider this offense with respect to the conspiracy alleged in Count 1 of the indictments. "In order to convict a defendant of a conspiracy, the existence of a conspiracy must be established with substantial evidence showing the presence of an agreement between two or more persons to commit a crime and an overt act in furtherance of the agreement by one of the conspirators, . . ., and with substantial evidence showing that each conspirator knew of, intended to join and participated in the conspiracy." **United States v. Shaddix,** 693 F.2d 1135 (5th Cir. 1982).

The defendants were arraigned on the superseding indictments and each entered a plea of "Not Guilty" as to all 5 counts contained therein. The defendants also waived their right to trial by jury. On March 15, 1983, the cause came on for trial before the Court, without a jury; both the United States of America and the defendants made announcements of ready and thereafter the Government presented its evidence. The evidence presented consisted solely of a stipulation of facts entered into by the defendants and the Government, such stipulation being admitted as Government Exhibit #1. The defendants introduced

no evidence. Thereafter, both parties rested and the Court took the matter under advisement.

After consideration of the evidence introduced at the trial of this cause, the Court hereby makes the following special findings:

1. That from on or about March 1, 1982, and continuously up to and including May 18, 1982, in the Eastern District of Texas, the defendants willfully and knowingly conspired with each other to commit offenses against the United States in violation of Title 18, United States Code, Section 952(a); Section 960; Title 21, United States Code, Section 841(a); Title 49, United States Code, Section 1472 (h); and Title 49, Code of Federal Regulations, Section 173.119; and

   In furtherance of the aforesaid conspiracy the defendants herein performed the overt act of departing, on May 18, 1982, from Titus County, Texas, in an aircraft bound for the United Mexican States;

2. That on or about May 18, 1982, in the Eastern District of Texas, the defendants did willfully, knowingly, intentionally, and contrary to law and §955, 952(a), and 960 of Title 21, United States Code, import into the United States from the United Mexican States approximately nine hundred and forty-eight pounds of Schedule I Controlled Substance, to wit: marijuana;

3. That on or about May 18, 1982, in the Eastern District of Texas, the defendants recklessly caused the transportation in air commerce of a hazardous material, to wit: gasoline, in violation of the rules, regulations, and requirements with respect to the transportation in air commerce of said hazardous material issued by the Secretary of Treasury under Chapter 20 of the Federal Aviation Program;

4. That on or about May 18, 1982, in the Eastern District of Texas, the defendants did willfully, knowingly, and intentionally, and not otherwise permitted or authorized by law possess with intent to distribute, approximately nine hundred and forty-eight pounds of a Schedule I Controlled Substance, to wit: marijuana;

5. That on or about May 17, 1982, pursuant to an order issued by C. Houston Abel, United States Magistrate, Eastern District of Texas, in response to the application and affidavit of Terry W. Lankford, an agent of the Texas Department of Public Safety, a tracking device was installed in the interior of a Piper Navajo Airplane, bearing FAA registration No. N4081L, while such aircraft was legally parked on the apron of the Mount Pleasant Municipal Airport, Titus County, Texas, and at a time when the said airplane was jointly leased to the defendants;

6. That the tracking device installed in the interior of the Piper Navajo Airplane, FAA No. N4081L, was monitored and utilized by agents of the United States Government to track, follow, observe, and locate the said airplane and the contraband made the subject of the indictments herein;

7. That the defendants had a joint possessory interest in the Piper Navajo Airplane, FAA No. N4081L, referred to in paragraph 5 above;

8. That the defendants have standing, under the facts, to challenge the search made pursuant to the Order referred to in paragraph 5 above, as an alleged intrusion of their expected right to privacy in their movements and an alleged violation of their right to be secure from unreasonable searches and seizures.

9. That the contraband made the basis of the indictments herein, and all evidence offered in support of the Government's cases, was seized and obtained as a result of the search made pursuant to the Order referred to in paragraph 5 above;

10. That the Order, Affidavit, and Return attached to Government Exhibit #1 as Exhibit A, is the Order, Affidavit and Return referred to hereinabove, and is the same Order made the basis of Defendants' Motion to Suppress and that said Exhibit A was offered and received in evidence without objection.

Based upon the evidence received at the trial of this cause and the applicable law, the Court finds the defendant, James Gregory Smith, GUILTY of the offenses charged in Counts 1 through 4 of his indictment, and also, the Court finds the defendant, Robert Shingle Speir, GUILTY of the offenses charged in Counts 1 through 4 of his indictment. Sentencing on these counts will be scheduled for each defendant on Monday, May 9, 1983, at 9:00 A.M. in the United States Courthouse in Tyler, Texas.

SIGNED this 6th day of April, 1983.

_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER. RE: 1981 TWIN ENGINE PIPER NAVAJO AIRCRAFT, SERIAL NUMBER PA-31 8112038, WHITE WITH YELLOW, ORANGE AND BROWN STRIPES, BEARING FAA NUMBER N4081L.	TX-82-348-M

APPLICATION FOR AN ORDER

NOW COMES TERRY W. LANKFORD, NARCOTICS INVESTIGATOR, TEXAS DEPARTMENT OF PUBLIC SAFETY AND HEREBY MAKES APPLICATION FOR AN ORDER AUTHORIZING THE INSTALLATION OF AN ELECTRONIC TRACKING DEVICE IN THE ABOVE DESCRIBED AIRCRAFT LOCATED IN THE NORTHERN DISTRICT OF TEXAS, AND IN SUPPORT THEREOF WOULD SHOW THE COURT THE FOLLOWING: SEE ATTACHED AFFIDAVIT.

IN THE UNITED STATE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

IN THE MATTER OF AN APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INSTALLATION AND USE OF AN ELECTRONIC TRACKING DEVICE ON A 1981 TWIN ENGINE PIPER NAVAJO AIRCRAFT, SERIAL NUMBER PA31-8112038, WHITE WITH YELLOW ORANGE AND BROWN STRIPES BEARING FAA NUMBER N4081I, LOCATED IN THE EASTERN DISTRICT OF TEXAS.	)	AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR THE USE OF AN ELECTRONIC AIRCRAFT TRACKING EQUIPMENT.

TERRY W. LANKFORD, being first duly sworn, deposes and says:

1. That I am a Narcotics Investigator with the Texas Department of Public Safety assigned to Corpus Christi, Texas. I have been so employed as a narcotics investigator since January 1, 1980. My duties as a narcotics investigator include the detection, identification and apprehension of narcotic smuggling violators and narcotic smuggling organizations who utilize aircraft to facilitate their smuggling activities. I have received specialized training in these types of investigations.

2. The affiant **alleges** that there is probable cause to believe that aircraft bearing FAA N4081L, a twin engine Piper aircraft, serial number PA31-8112038, being white with yellow, orange and brown stripes will be utilized to commit offenses as defined in 19 U.S. Code, Sections 1459 and 1460; being violations arising from the failure to report and manifest goods imported into the United States and 18

U.S. Code, Section 545; being violations arising from bring into the United States any merchandise contrary to Law and 21 U.S. Code, Sections 952,846 and 841(a)(1); being violations arising out of the smuggling and possession with intent to distribute controlled substances into and within the United States.

3. The affiant states that the **facts which establish probable cause** necessary for the issuance of an order authorizing the installation and utilization of electronic aircraft tracking equipment in the above captioned aircraft **is as follows:**

   A. **On 05-16-82,** affiant **received information** from a **cooperating individual** that a Piper Navajo aircraft, N4081L, had arrived at Chaparral Aviation at the Corpus Christi International Airport on **05-16-82** at approximately **10:00 pm.** The above mentioned aircraft was in need of fuel and upon arrival was occupied by two (2) white males. One (1) of the subjects was later identified as James Gregory Smith. The cooperating individual informed the affiant that Smith and the other occupant of the aircraft wanted to purchase fuel for the above described aircraft and upon being advised that they would have to wait until the next date for fuel, Smith and the unidentified subject left the airport on foot and walked toward the main airport terminal.

   B. The affiant **was informed by a cooperating individual** that on **05-16-82,** at approximately **5:30 am,** Smith and the same unidentified subject returned to Chapparal Aviation for the purpose of having the above mentioned aircraft refueled. The cooperating individual, while refueling the aircraft observed that all of the seats had been removed from the aircraft with the exception of the pilot and co-pilot seats. Removing the rear seats from an aircraft to be utilized in a

narcotic smuggling operation is very common in that the pay-load, or total cargo capacity is increased to a maximum. The **cooperating individual further informed the affiant** that while refueling the aircraft, he was requested by Smith to assist him (Smith) in fueling a two hundred (200) gallon auxiliary fuel cell which was located in the floor of the main cabin of the aircraft. Smith was inside the aircraft and requested that the cooperating individual remain outside the aircraft and assist him (Smith) by holding a ventilating hose, which was connected to the utility fuel cell. The carrying of extra fuel onboard an aircraft is a felony in direct violation of Title 49, U.S.C. Section 1803 and 1809, which prohibits the transportation of hazardous materials onboard an aircraft. This method of carrying auxiliary fuel on an aircraft to be used in a smuggling operation is very common in that it enables the aircraft to be flown to such locations as Central and South America and return to the United States without a need for refueling. **Based on experience** as a narcotics investigator **the affiant knows** that Central and South America are the most popular locations for smugglers to purchase their narcotics.

C. The **affiant inquired with the Federal Aviation Administration** in Oklahoma City and learned that Piper Navajo, N4081L, was purchased on 01-19-82 in the name of C.V. Aviation, 2311 Federal Avenue, Seattle, Washington. **Information received** indicates that C.V. Aviation is owned by Carl M. Gritzmaker and Vern L. Raburn. No current intelligence data exists on Gritzmaker of Raburn at the present time.

D. **Suspect** James Gregory Smith **is known to the Affiant to be a documented narcotics smuggler**

who utilizes aircraft in his (Smith's) **smuggling operation.** Smith **is currently the target of a separate investigation** being conducted by the Texas Department of Public Safety, Narcotics Service in Corpus Christi, Texas. The Affiant **learned** through this separate investigation that **Smith is the owner of a twin engine Beechcraft Queen Air, N36S** and he (Smith) is currently having an aircraft hangar constructed at the Aransas County Airport in Rockport, Texas. **Smith stated to a cooperating individual that the reason** for having the hangar built in Aransas County and not in Corpus Christi (Smith's residence) is because there are too many "Feds" (federal agents) in the Corpus Christi, Texas area.

E. The Affiant **also learned** through **a cooperating individual** that Smith has been presenting himself as a "high roller". Smith elaborated further as having associates in Nevada and Florida and that he (Smith) was accustomed to paying large sums of money "under the table" in order to get what he (Smith) wants.

F. The **Affiant learned that** all work performed on Beechcraft aircraft, N36S, **while at the Aransas County Airport was done in the name of Magnum Aviation, Inc. The Affiant overheard Smith tell the employees** at Chaparral Aviation on 05-16-82 that he (Smith) is the owner of Magnum Aviation, Inc., located at 710 Buffalo Street, in Corpus Christi, Texas. **As a result of investigation conducted on Smith** by the Texas Department of Public Safety, Narcotics Service as previously mentioned herein, **it was learned from the** Texas Secretary of State, Corporation Division, **that Magnum Aviation Inc. is not currently or properly registered as a corporation** to

conduct business as such. **Corporation Division records reflect** that **Magnum Aviation, Inc. has filed for "name reservation"** as of February 18, 1982. The Affiant **also learned** that the Assumed Names Division of the Nueces County District Clerk's Office in Corpus Christi, Texas has no such business as Magnum Aviation registered as doing legitimate business in Corpus Christi. The Affiant **also learned** that the local address associated with Magnum Aviation, 710 Buffalo Street, is actually the address of Magnum Tools and not that of Magnum Aviation. An inquiry was made with Magnum Tools at the above address and it was learned that Magnum Tools is in no way affiliated with Magnum Aviation. **As a result of the above mentioned checks conducted by this office,** the **Affiant believes** that Magnum Aviation is not a legitimate business and it actually a "front" for Smith in his smuggling operation. The practice of utilizing a ficticious company name is common to narcotic smuggling violators in that it is a method by which they (suspects) can keep their true names and affiliations secret from the authorities.

G. On **05-16-82 at approximately 5:15 pm** Smith **and the above mentioned unidentified white male departed Chaparral Aviation** in the **Piper aircraft, N4081L, filing a flight plan and giving their destination as Winnsboro, Texas.** Prior to departing the airport the **above mentioned unidentified white male was overheard by the Affiant checking the weather conditions for a flight to St. Thomas in the Virgin Islands.** This is significant in that it shows an intent by the pilot to make an overseas flight. Surveillance units were sent to the **Winnsboro, Texas** airport in an attempt to locate the Piper aircraft,

N4081L, and although they were unable to locate the aircraft **they did locate a 1979 Ford pick up,** 1982 Texas NB 4960, which **is registered to James G. Smith,** Box 10, Leesburg, Texas. When the aircraft failed to arrive at the Winnsboro, Texas airport Texas Ranger B. Foster checked several airstrips and airports in the area and at **approximately 10:15 pm Ranger Foster located the Piper aircraft N4081L, at the Mount Pleasant, Texas airport.**

WHEREFORE, Affiant **believes that probable cause exists to believe** that the aforementioned and described **Piper aircraft, N4081L, is going to be utilized to commit offenses against the laws** of the United States of America **as defined in paragraph two (2) of this document** and that conventional methods of investigation have failed in the past and/or are likely to fail in the future in the detection and apprehension of said type smuggling endeavor, and that the installation of electronic tracking devices in said aircraft, N4081L, will result in the detection of the aircraft from foreign territories into the United States resulting the seizure of Controlled Substances pursuant to statutes cited in this Affidavit. The electronic tracking device to be installed, maintained and utilized is known as a transponder or a beeper or both and such installation shall be performed by a qualified officer of the U.S. Customs Service Air Branch and/or electronic technicians of the U.S. Customs Service, Department of Treasury and shall be in accordance with Federal Aviation Administration procedures. Furthermore, this electronic tracking device will in no way impair or affect the safe operation of said aircraft, to include flight performance, navigation or any other aspect of safe

flight. The success of this investigation depends upon this Affidavit, Application and Order being kept secret. Therefore, it is additionally requested that this Affidavit, Application and Order be sealed by the Court. It is further requested that the United States Customs Service Officers and Employees be authorized to enter private premises and/or buildings which may house aircraft N4081L for the purpose of said installation and maintenance and that it may be accomplished during the day or night time hours as circumstances dictate.

_____

Affiant: Terry W. Lankford
Texas Department of Public Safety

Sworn to before me and subscribed in my presence on *May 17* 1982 at *4:52 p.m.* in *Tyler*, Texas.

IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

APPLICATION OF THE UNITED STATES
OF AMERICA FOR AN ORDER.

RE: 1981 TWIN ENGINE PIPER NAVAJO)
AIRCRAFT, SERIAL NUMBER PA-31)
8112038, WHITE WITH YELLOW,)
ORANGE AND BROWN STRIPES,)
BEARING FAA NUMBER N4081L.)

ORDER OF THE COURT

THE COURT, AFTER CONSIDERING THE APPLICATION AND AFFIDAVIT FOR AN ORDER OF THE COURT CONCERNING THE INSTALLATION AND UTILIZATION OF AN ELECTRONIC TRACKING DEVICE ON A PIPER NAVAJO AIRCRAFT, BEARING FAA REGISTRATION NUMBER N4081L AND AFTER CONSIDERING THE ATTACHED AFFIDAVIT, HEREBY ORDERS THE FOLLOWING:

1. **THAT ANY OFFICER OF THE UNITED STATES CUSTOMS SERVICE** OR HIS AUTHORIZED REPRESENTATIVE, CONTINUE TO INVESTIGATE THE SUBJECT MATTER IN THE ATTACHED AFFIDAVIT, AND **AS SOON AS FEASIBLE, INSTALL,** MAINTAIN AND UTILIZE AND ELECTRONIC TRACKING DEVICE ON THE ABOVE MENTIONED AND DESCRIBED AIRCRAFT.

2. **THAT ANY OFFICER OF THE UNITED STATES CUSTOMS SERVICE** OR HIS AUTHORIZED REPRESENTATIVE **TO ENTER SAID AIRCRAFT, IF NECESSARY,** AND TO ENTER PRIVATE OR PUBLIC PREMISES AND/OR BUILDINGS WHICH MAY HOUSE SAID AIRCRAFT FOR THE PURPOSE OF INSTALLING THE AFOREMENTIONED ELECTRONIC TRACKING DEVICE.

3. THAT THE INSTALLATION BE ACCOMPLISHED **AT ANY TIME OF THE DAY OR NIGHT.**

4. THAT **INVESTIGATOR TERRY W. LANKFORD NOTIFY THE COURT IN WRITING** PROMPTLY AFTER SAID DEVICE IS INSTALLED.

5. THAT THIS AUTHORIZATION IS TO REMAIN IN EFFECT FOR THIRTY DAYS FROM THE SIGNING OF THIS ORDER.

6. THAT THE AFFIDAVIT, APPLICATION AND ORDER FROM THE COURT AND ANY OTHER RELATED DOCUMENTS **HEREIN BE SEALED** AND SHALL REMAIN IN THE CUSTODY OF THE COURT UNTIL THE TIME SET FOR THE EXPIRATION OF THE AUTHORIZATION FOR THE USE OF SAID SURVEILLANCE AIDS AS SET FORTH ABOVE.

SIGNED AND ENTERED AT *SMITH* COUNTY, TEXAS, THIS THE *17th* DAY OF MAY, 1982, AT *4:52* O'CLOCK P.M.

_____

U.S. Magistrate

IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

RE: 1981 TWIN ENGINE PIPER NAVAJO AIRCRAFT, SERIAL NUMBER PA-31 8112038, WHITE WITH YELLOW, ORANGE, AND BROWN STRIPES, BEARING FAA NUMBER N4081L.	))))))	TX-82-348-M **AFFIDAVIT**

STATE OF TEXAS)
) ss.
COUNTY OF SMITH)

I, TERRY W. LANKFORD, being an Investigator with the Texas Department of Public Safety, upon my oath, do hereby depose and say:

That at 1:00 a.m. on May 16, 1982 I **assisted officers** of the United States Customs Service in the installation of an electronic tracking device in Aircraft Number N4081L, while it was parked on the apron of the Mount Pleasant Municipal Airport, Titus County, Texas.

TERRY W. LANKFORD
Affiant

SUBSCRIBED AND SWORN to before me this *19th* day of May, 1982.

UNITED STATES MAGISTRATE

United States of America vs.

DEFENDANT: JAMES GREGORY SMITH

IN THE UNITED STATES DISTRICT COURT for

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION (at Tyler, Texas)

Docket No: TX-82-18-CR-ol

JUDGEMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date: May 16, 1983

COUNSEL: ___WITHOUT COUNSEL: However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

__X WITH COUNSEL _ Don Ervin, _ _ _ _

Houston, Tx _____

to counts 1,2,3, and 4 of the Indictment (superseding)

PLEA: ___Guilty, and the court being satisfied that there is a factual basis for the plea.

___NOLO CONTENDERE,

__X NOT GUILTY

There being a finding/XXXX of:

___NOT GUILTY, Defendant is discharged

__X GUILTY, to counts 1,2,3, and 4 of the superseding Indictment.

Defendant has been convicted as charged of the offense(s) of: Conspiring to import Marijuana into the U.S.; to transport gasoline in air commerce; and to possess marijuana with intent to distribute in violation of 18 USC Sec. 371, as charged

FINDING & JUDGMENT

in Ct. 1; importing marijuana into the U.S. in violation of 21 USC Sec. 952(a) as charged in Ct. 2; transporting gasoline in air commerce in violation of 49 USC Sec. 1472(h) as charged in Ct. 3; and possessing marijuana with intent to distribute in violation of 21 USC Sec. 841(a) as charged in Ct. 4 of the Indictment.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

SENTENCE OR PROBATION ORDER

Five (5) years as to Count 1 of the Indictment, which the Defendant is required to serve. Five (5) years as to counts 2,3, and 4 of the Indictment, which Defendant is required to serve, said sentence to run concurrent with Count 1 and with each other. A special parole term of Two (2) years as to each count is imposed.

Defendant allowed to remain on same bond pending any appeal of this case.

F I L E D
U.S.DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MAY 16, 1983
MURRAY L. HARRIS, CLERK
BY DEPUTY s/ Anita D. Thomason

SIGNED BY

X U.S. District Judge: s/ WILLIAM M. STEGER

___ U.S. MAGISTRATE

F-1-e

Date: 5-16-83

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AMENDMENT (IV.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 Sec. 924. Penalties

(a) Whoever violated any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more

than $10,000., or imprisoned not more than ten years, or both.

(c) Whoever--

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other

provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in Section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

Rule 41 RULES OF CRIMINAL PROCEDURE

Rule 41. Search and Seizure

(a) Authority to Issue Warrant.--A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property or Persons Which May Be Seized with a Warrant.--A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or

who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant Upon Affidavit.--A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that

such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant upon oral testimony.--

(A) General Rule.--If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may

issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application.--The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal Magistrate. The Federal Magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal Magistrate may direct that the warrant be modified.

(C) Issuance.--If the Federal Magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal Magistrate shall order the issuance of a warrant

by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and certification of testimony.- When a caller informs the Federal Magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal Magistrate shall record by means of such device all of the call after the caller informs the Federal Magistrate

that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal Magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal Magistrate shall file a signed copy with the court.

(E) Contents.--The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional rule for execution.--The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to suppress precluded.--Ab-

sent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with written affidavit.

Sec. 841 Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section

845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000., or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000., or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a special parole term of at least 3 years in addition to

such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000., or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000., or both.

Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such a term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000., or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter, or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine

of not more than $20,000., or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000., or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more

than $10,000., or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(c)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000., or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, of for a felony under any other pro-

vision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000., or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absense of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of

such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the re-

mainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Piperidine offenses and penalty

(d) Any person who knowingly and intentionally-

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000., or both.

Sec. 952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that-

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic

drug in schedule III, IV, or V, that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States-

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufactures of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title.

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Nonnarcotic controlled substances
in schedules III, IV, or V

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance--

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe, except that if a nonnarcotic controlled substance in schedule III, IV, or V is also listed in schedule I or II of the Convention on Psychotropic Substances it shall be imported pursuant to such import permit re-

quirements, prescribed by regulation of the Attorney General, as are required by the Convention.

Coca leaves

(c) In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

Pub.L. 91-513, Title III, Sec. 1002, Oct. 27, 1970, 84 Stat. 1285; Pub.L. 95-633, Title I, Sec. 105, Nov. 10, 1978, 92 Stat. 3772.

Sec. 960. Prohibited acts A

Unlawful acts

(a) Any person who--

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

Penalties

(b)(1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000., or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special

parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled usbstance is in schedule IV.

Special parole term

(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.

Pub.L. 91-513, Title III, Sec. 1010, Oct. 27, 1970, 84 Stat. 1290.

49 Sec. 1472. Criminal penalties

Generally

(a) Any person who knowingly and willfully violates any provision of this chapter (except subchapters III, V, VI, VII, and XII of this chapter), or any order, rule, or regulation issued by the Administrator or by the Board under any such provision or any term, condition, or limitation of any certificate or permit issued under subchapter IV of this chapter, for which no penalty is otherwise provided in this section or in section 1474 of this title, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than $2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

Forgery of certificates and false marking of aircraft

(b) Any person who knowingly and willfully forges, counterfeits, alters, or falsely makes any certificate authorized to be issued under this chapter, or knowingly uses or attempts to use any such fraudulent certificate, and any person who knowingly and willfully displays or causes to be displayed on any aircraft, any marks that are false or misleading as to the nationality or registration of the aircraft, shall be subject to a fine of not exceeding $1,000 or to imprisonment not exceeding three years, or to both such fine and imprisonment.

Interference with air navigation

(c) A person shall be subject to a fine of not exceeding $5,000 or to imprisonment not exceeding five years, or to both such fine and imprisonment, who--

(1) with intent to interfere with air navigation within the United States, exhibits within the United States any light or signal at such place or in such manner that it is likely to be mistaken for a true light or signal established pursuant to this chapter, or for a true light or signal in connection with an airport or other air navigation facility: or

(2) after due warning by the Administrator, continues to maintain any misleading light or signal: or

(3) knowingly removes, extinguishes, or interferes with the operation of any such true light or signal.

Offering, granting, giving, soliciting, or accepting rebates or concessions

(d)(1) Any air carrier, foreign air carrier,

or ticket agent, or any officer, agent, employee, or representative thereof, who shall, knowingly and willfully, offer, grant, or give, or cause to be offered, granted, or given, any rebate or other concession in violation of the provisions of this chapter, or who, by any device or means, shall, knowingly and willfully assist, or shall willingly suffer or permit, any person to obtain transportation or services subject to this chapter at less than the rates, fares, or charges lawfully in effect, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be subject for each offense to a fine of not less than $100 and not more than $5,000.

(2) Any person who, in any manner or by any device, knowingly and willfully solicits, accepts, or receives a refund or remittance of any portion of the rates, fares, or charges lawfully in effect for the air transportation of property, or for any service in connection therewith, or knowingly solicits, accepts, or receives any privilege, favor,

or facility, with respect to matters required by the Board to be specified in currently effective tariffs applicable to the air transportation of property, shall be fined not less than $100, nor more than $5,000., for each offense.

Failure to file reports;
falsification of records

(e) Any carrier, or any officer, agent, employee, or representative thereof, who shall knowingly and willfully, fail or refuse to make a report to the Board of Administrator as required by this chapter, or to keep or preserve accounts, records, and memoranda in the form and manner prescribed or approved by the Board or Administrator, or shall, knowingly and willfully, falsify, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file any false report, account, record, or memorandum, shall be deemed guilty of a misdemeanor and, upon conviction thereof, be subject

for each offense to a fine of not less than $100 and not more than $5,000.

Divulging information; information to Congressional committees

(f) If the Administrator or any member of the Board, or any officer or employee of either, shall knowingly and willfully divulge any fact or information which may come to his knowledge during the course of an examination of the accounts, records, and memoranda of any air carrier, or which is withheld from public disclosure under section 1504 of this title, except as he may be directed by the Administrator or the Board in the case of information ordered to be withheld by either, or by a court of competent jurisdiction or a judge thereof, he shall upon conviction thereof be subject for each offense to a fine of not more than $5,000 or imprisonment for not more than two years, or both: Provided, That nothing in this section shall authorize the withholding of infor-

mation by the Administrator or Board from the duly authorized committees of the Congress.

PENALTIES

Refusal to testify

(g) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, or documents, if in his power to do so, in obedience to the subpena or lawful requirement of the Board or Administrator, shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine of not less that $100 nor more than $5,000., or imprisonment for not more than one year, or both.

Safe transportation of hazardous materials

(h)(1) In carrying out his responsibilities under this chapter, the Secretary of Transpor-

tation may exercise the authority vested in him by section 1804 of this title to provide by regulation for the safe transportation of hazardous materials by air.

(2) A person is guilty of an offense if he willfully delivers or causes to be delivered to an air carrier or to the operator of a civil aircraft for transportation in air commerce, or if he recklessly causes the transportation in air commerce of, any shipment, baggage, or other property which contains a hazardous material, in violation of any rule, regulation, or requirement with respect to the transportation of hazardous materials issued by the Secretary of Transportation under this chapter. Upon conviction, such person shall be subject for each offense, to a fine of not more than $25,000, imprisonment for a term not to exceed 5 years, or both.

(3) Nothing in this subsection shall be construed to prohibit or regulate the transportation

by any individual, for personal use, of any firearm (as defined in paragraph (4) of section 232 of Title 18) or any ammunition therefor.

Aircraft piracy

(i)(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished--

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an air-

craft within the special aircraft jurisdiction of the United States.

(3) An attempt to commit aircraft piracy shall be within the special aircraft jurisdiction of the United States even though the aircraft is not in flight at the time of such attempt if the aircraft would have been within the special aircraft jurisdiction of the United States had the offense of aircraft piracy been completed.

Sec. 1802 Definitions

As used in this chapter, the term--

(1) "commerce" means trade, traffic, commerce, or transportation, within the jurisdiction of the United States, (A) between a place in a State and any place outside of such State, or (B) which affects trade, traffic, commerce, or transportation described in clause (A);

(2) "hazardous material" means a substance or material in a quantity form which may pose an unreasonable risk to health and safety or property when transported in commerce;

(3) "Secretary" means the Secretary of Transportation, or his delegate;

(4) "serious harm" means death, serious ill-

ness, or severe personal injury;

(5) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands American Samoa, or Guam;

(6) "transports" or "transportation" means any movement of property by any mode, and any loading, unloading, or storage incidental thereto; and

(7) "United States" means all of the States.

Sec. 1803 Designation of hazardous materials

Upon a finding by the the Secretary, in his discretion, that the transportation of a particular quantity and form of material in commerce may pose an unreasonable risk to health and safety or property, he shall designate such quantity and form of material or group or class of such mater-

ials as a hazardous material. The materials so designated may include, but are not limited to, explosives, radioactive materials, etiologic agents, flammable liquids or solids, combustible liquids or solids, poisons, oxidizing or corrosive materials, and compressed gases.

Sec. 1804. Regulations governing transportation of hazardous materials

General

(a) The Secretary may issue, in accordance with the provisions of Section 553 of Title 5 including an opportunity for informal oral presentation, regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is repre-

sented, marked, certified, or sold by such person for use in the transportation or commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, recording, and routing (other than with respect to pipelines) of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold by such person for use in the transportation of certain hazardous materials.

Cooperation

(b) In addition to other applicable requirements, the Secretary shall consult and cooperate with representatives of the Interstate Commerce Commission and shall consider any relevant suggestions made by such Commission, before issuing

any regulation with respect to the routing of hazardous materials. Such Commission shall, to the extent of its lawful authority, take such action as is necessary or appropriate to implement any such regulation.

Representation

(c) No person shall, by marking or otherwise, represent that a container or package for the transportation of hazardous materials is safe, certified, or in compliance with the requirements of this Act, unless it meets the requirements of all applicable regulations issued under this Act.

Sec. 1806. Exemptions

General

(a) The Secretary, in accordance with procedures prescribed by regulation, is authorized to issue or renew, to any person subject to the

requirements of this chapter, an exemption from the provisions of this chapter, and from regulations issued under section 1804 of this Title, if such person transports or causes to be transported or shipped, hazardous materials in a manner so as to achieve a level of safety (1) which is equal to or exceeds that level of safety which would be required in the absence of such exemption, or (2) which would be consistent with the public interest and the policy of this chapter in the event there is no existing level of safety established. The maximum period of an exemption issued or renewed under this section shall not exceed 2 years, but any such exemption may be renewed upon application to the Secretary. Each person applying for such an exemption or renewal shall, upon application, provide a safety analysis as prescribed by the Secretary to justify the grant of such exemption. A notice of an application for issuance or renewal of such exemption shall be published in the Federal Register. The Secretary shall afford access to any such safety

analysis and an opportunity for public comment on any such application, except that nothing in this sentence shall be deemed to require the release of any information described by subsection (b) of Section 552 of Title 5, or which is otherwise protected by law from disclosure to the public.

Vessels

(b) The Secretary shall exclude, in whole or in part, from any applicable provisions and regulations under this chapter, any vessel which is excepted from the application of Section 201 of the Ports and Waterways Safety Act of 1972 by paragraph (2) of such section, or any other vessel regulated under such Act, to the extent of such regulation.

Firearms and ammunition

(c) Nothing in this chapter, or in any regulation issued under this chapter, shall be con-

strued to prohibit or regulate the transportation by any individual, for personal use, of any firearm (as defined in paragraph (4) of section 232 of Title 18) or any ammunition therefor, or to prohibit any transportation of firearms or ammunition in commerce.

Limitation on authority

(c) Except when the Secretary determines that an emergency exists, exemptions or renewals granted pursuant to this section shall be the only means by which a person subject to the requirements of this chapter may be exempted from or relieved of the obligation to meet any requirements imposed under this chapter.

Sec. 1808. Powers and duties of Secretary

General

(a) The Secretary is authorized, to the extent

necessary to carry out his responsibilities under this chapter, to conduct investigations, make reports, issue subpoenas, conduct hearings, require the production of relevant documents, records, and property, take depositions, and conduct, directly or indirectly, research, development, demonstration, and training activities. The Secretary is further authorized, after notice and an opportunity for a hearing, to issue orders directing compliance with this chapter or regulations issued under this chapter; the district courts of the United States shall have jurisdiction, upon petition by the Attorney General, to enforce such orders by apporpriate means.

Records

(b) Each person subject to requirements under this chapter shall establish and maintain such records, make such reports, and provide such information as the Secretary shall by order or regulation prescribe, and shall submit such reports

and shall make such records and information available as the Secretary may request.

Inspection

(c) The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to

(1) the manufacture, fabrication, marking, maintenance, reconditioning, repair, testing, or distribution of packages or containers for use by any person in the transportation of hazardous materials in commerce; or

(2) the transportation or shipment by any person of hazardous materials in commerce.

Any such officer, employee, or agent shall, upon request, display proper credentials.

Facilities and duties

(d) The Secretary shall--

(1) establish and maintain facilities and technical staff sufficient to provide, within the Federal Government, the capability of evaluating risks connected with the transportation of hazardous materials and materials alleged to be hazardous;

(2) establish and maintain a central reporting system and data center so as to be able to provide the law-enforcement and fire-fighting personnel of communities, and other interested persons and government officers, with technical and other information and advice for meeting emergencies connected with the transportation of hazardous materials;

and

(3) conduct a continuing review of all aspects of the transportation of hazardous materials in order to determine and to be able to recommend appropriate steps to assure the safe transportation of hazardous materials.

Annual report

(e) The Secretary shall prepare and submit to the President for transmittal to the Congress on or before May 1 of each year a comprehensive report on the transportation of hazardous materials during the preceding calendar year. Such report shall include, but need not be limited to--

(1) a thorough statistical compilation of any accidents and casualties involving the transportation of hazardous materials;

(2) a list and summary of applicable Federal regulations, criteria, orders, and exemptions in effect;

(3) a summary of the basis for any exemptions granted or maintained;

(4) an evaluation of the effectiveness of enforcement activities and the degree of voluntary compliance with applicable regulations;

(5) a summary of outstanding problems confronting the administration of this chapter, in order of priority; and

(6) such recommendations for additional legislation as are deemed necessary or appropriate.

Sec. 1809. Penalties

Civil

(a)(1) Any person (except an employee who acts without knowledge) who is determined by the Secretary, after notice and an opportunity for a hearing, to have knowingly committed an act which is a violation of a provision of this chapter or of a regulation issued under this chapter, shall be liable to the United States for a civil penalty. Whoever knowingly commits an act which is a violation of any regulation, applicable to any person who transports or causes to be transported or shipped hazardous materials, shall be subject to a civil penalty of not more than $10,000, for each violation, and if any such violation is a continuing one, each day of violation constitutes a separate offense. Whoever knowingly commits an act which is a violation of any regulation applicable to any person who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented,

marked, certified, or sold by such person for use in the transportation in commerce of hazardous materials shall be subject to a civil penalty of not more than $10,000 for each violation. The amount of any such penalty shall be assessed by the Secretary by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Such civil penalty may be recovered in an action brought by the Attorney General on behalf of the United States in the appropriate district court of the United States or, prior to referral to the Attorney General, such civil penalty may be compromised by the Secretary. The amount of such penalty, when finally determined (or agreed

upon in compromise), may be deducted from any sums owed by the United States to the person charged. All penalties collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

Criminal

(b) A person is guilty of an offense if he willfully violates a provision of this chapter or a regulation issued under this chapter. Upon conviction, such person shall be subject, for each offense, to a fine of not more than $25,000, imprisonment for a term not to exceed 5 years, or both.

Sec. 173.119 Flammable liquids not specifically provided for.

(a) Flammable liquids with flash point 20 degrees F. or below. Flammable liquids with flash point 20 degrees F. or below and having vapor pressure (Reid[1] test) not over 16 pounds per square inch, absolute, at 100 degrees F., other than those for which special requirements are prescribed in this Part, must be prepared for shipment in specification containers of a design and constructed of materials that will not react dangerously with or be decomposed by the chemical packed therein as required in the following paragraphs (see paragraphs (c) to (i) of this section for high pressure liquids, paragraphs (j) to (l) of this section for viscous liquids, and paragraph (m) of this section for flammable liquids which are also oxidizers, corrosive liquids, poison B liquids, or organic peroxides and Section

173.134 for flammable liquids that are also pyrophoric liquids):

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[1]ASTM Test D323.

(1) Specification 1A, 1D, or 1M (Sections 178.1, 178.4, 178.17 of this subchapter). Glass carboys in boxes or expanded polystyrene packagings. Rated capacity may not exceed 5 gallons for Specification 1A. Not authorized for transportation by aircraft.

(2) Spec. 5, 5A, 5B, 5C, or 5M (Sections 178.80, 178.81, 178.82, 178.83, or 178.90 of this subchapter). Metal barrels or drums, with openings not exceeding 2.3 inches in diameter.

(3) Specification 17E (Sec. 178.116 of this subchapter). Metal drums (single-trip) with openings not over 2.3 inches in diameter. Drums with a marked capacity of more than 5 gallons but

not more than 30 gallons must be constructed of 19-guage body and head sheets. Drums with a marked capacity in excess of 30 gallons must be constructed of 18-guage body and head sheets. Drums with a marked capacity of more than 5 gallons are not authorized for transportation by air.

(4) Specification 17C (Sec. 178.115 of this subchapter). Metal drums (single-trip), with openings not exceeding 2.3 inches in diameter.

(5)(6) (Reserved)

(7) Spec. 12B (Sec. 178.205 of this subchapter). Fiberboard boxes with inside containers which must be glass or earthenware, not over 1 quart each; metal cans not over 1 gallon each.

Note 1: Spec. 12B fiberboard boxes (Sec. 178.205-26(a) of this subchapter), with one inside rectangular metal can, spec. 2F (Sec. 178.25 of this subchapter) not to exceed 5 gallons capacity,

are authorized for gasoline only. Gross weight of completed package not over 65 pounds.

(8) Spec. 15A, 15B, 15C, 16A, 19A, or 19B (Sections 178.168, 178.169, 178.170, 178.185, 178.90, or 178.191 of this subchapter). Wooden boxes with inside containers which must be metal pails, kits, or cans, not over 10 gallons each or inside glass or earthenware containers up to 3 gallons each are authorized when only one inside container is packed in each outside container.

(9) Spec. 21C, 22A or 22B (Sec. 178.224, Sec. 178.196 or Sec. 178.197 of this subchapter). Fiber drums and plywood drums with a single inside glass, earthenware, or metal container of not over one gallon capacity in each drum. Inside container must be so cushioned at top, sides, and bottom, as to prevent breakage or leakage in transit.

(10) Specification 42B, (Sec. 178.107, of

this subchapter). Aluminum drums.

(11) Cylinders as prescribed for any compressed gas, except acetylene.

(12) Specification 103,[2] 103W, 103ALW, 103DW, 104,[2] 104W, 105A100,[2] 105A100ALW, 105A100W, 106A-500X, 106A800XNC, 106A800NCI,[2] 109A100ALW, 109A-300W, 110A500W, 111A60ALW1, 111A60F1, 111A60W1, 111A100W3, 111A100W4, 111A100W6, 112A200W, 112A-400F, 114A340W, 115A60W1, 115A60ALW, 115A60W6, ARA-III,[2] ARA-IV,[2] or ARA-IV-A[2] (Sections 179.100, 179.101, 179.200, 179.201, 179.220, 179.300, 179.301 of this subchapter). Tank cars. For cars equipped with expansion domes, manway closures must be so designed that pressure will be released automatically by starting the operation of removing the manway cover. Openings in tank heads to facilitate application of lining are authorized on tank cars constructed before January 1, 1975. These openings must be closed in an approved (Sec. 179.3 of this subchapter) manner.

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[2]Use of existing tank cars authorized, but new construction not authorized.

(13) The use of spec. 103AL special riveted aluminum tank cars is authorized for the transportation of gasoline, ethyl acetate, acetone, methanol, or butyraldehyde as provided in special orders of November 5, 1937 and February 1, 1939.

(14) Spec. 15X (Sec. 178.181 of this subchapter). Wooden boxes with inside metal containers. For shipment by common carriers by water to noncontiguous territories or possessions of the United States and foreign countries; shipments from inland points in the United States which are consigned to such destinations are authorized to be transported to ship side by rail freight in carload lots only and by motor vehicle in truckload lots only.

(15)-(16) (Reserved)

(17) Specification MC 300, MC 301, MC 302, MC 303, MC 304, MC 305, MC 306, MC 307, MC 330,[3] or MC 331[3] (Sections 178.340, 178.341, 178.342, 178.337). Tank motor vehicles. Bottom outlets on specification MC 304 cargo tanks must be equipped with valves conforming with Sec. 178.342-5(a). Bottom outlets on specifications MC 330 and MC 331 cargo tanks must be equipped with valves conforming with Sec. 178.33711(c).

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[3]In addition to other requirements of this section, necessary interior cleaning of the tanks must be performed between changes in lading. Safety relief devices must be in accordance with specification MC 331 (Sec. 1-8.337).

(18) The use of existing tank cars constructed to specifications Emergency USG-A,[4] USG-B,[4] or USG-C[4] in effect prior to June 4, 1956 is autho-

rized for the transportation of liquids weighing not over 8 pounds per gallon, and having vapor pressures not exceeding 16 pounds per square inch, absolute, at 100 degrees F.

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[4]Use of existing tank cars authorized, but new construction not authorized.

(19) Spec. 5L (Sec. 178.89 of this subchapter). Metal barrels or drums for gasoline shipments offered by or consigned to the Departments of the Army, Navy, and Air Force of the United States Government or Allies. Use of this container will be permitted because of the present emergency and until further order of the Department.

(20) Spec. 12D (Sec. 178.207 of this subchapter) Fiberboard boxes with inside containers which must be glass or earthenware not over one gallon each; authorized for not more than 75 pounds gross weight; not to contain more than 4

such containers if their capacity is greater than 5 pints each. Use of this container will be permitted because of the present emergency and until further order of the Department.

(21) Gasoline samples in boxes or metal not lighter than 20 gauge, United States standard, having hinged cover securely closed, and containing not more than 5 inside rectangular metal cans with screw cap closure, each having a capacity not to exceed one half gallon, may be shipped when consigned to state laboratories for examination.

(22) Specification 17H or 37A (Sections 178.118 and 178.131 of this subchapter). Metal drums with inside glass packagings not over 9 pints capacity each. Inside containers may contain biological materials if these materials are not etiologic agents, except that etiologic agents exempt by Sec. 173.386(d) are authorized.

(23) Specification 12A (Sec. 178.210 of this subchapter). Fiberboard box, with inside glass bottles or specification 2E (Sec. 178.24a of this subchapter) polyethylene bottles, not over 1 gallon capacity each. Polyethylene bottles are authorized only for materials that will not react with, or cause decomposition of the plastic. Not more than four inside bottles exceeding 5 pints capacity each may be packed in a package. Shipper must have established that the completed package meets the test requirements prescribed by Sec. 178. 21010 of this subchapter.

(24) Spec. 6D (Sec. 178.102 of this subchapter). Cylindrical steel overpack with inside spec. 2S (Sec. 178. 35 of this subchapter) polyethylene container.

(25) Spec. 51 (Sec. 178.245 of this subchapter). Portable tanks.

(26) Specification 57 (Sec. 178.253 of this

subchapter). Portable tanks. Not authorized for transportation by water.

(27) Specification 12P (Sec. 178.211 of this subchapter). Fiberboard box with one inside specification 2U (Sec. 178.24 of this subchapter) polyethylene container of not over 5-gallon capacity, or two inside specification 2U polyethylene containers of not over 2 and one half gallon capacity each. Authorized only for material which will not react with or cause decomposition of polyethylene. Not authorized for transportation by air.

(28) Specification 12A (Sec. 178.210 of this subchapter). Fiberboard boxes with inside metal containers not over 1-gallon capacity each. Not more than six metal containers shall be packed in a 275-pound test, double faced, corrugated fiberboard, specification 12A box and gross weight shall not exceed 45 pounds. The inner flap gaps of the box shall not exceed five-eighths inch and

the box shall provide a tight fit so there is no movement of the cans within the box.

(29) Marine portable tanks meeting the requirements of 46 CFR Part 64 authorized for highway cargo vessel only when shipped in support of off-shore oil well drilling activities. Tanks shall comply with mounting and tie-down requirements of Sec. 178.245-4 of this subchapter when transported by highway.

(30) IM portable tanks, under conditions specified in the IM Tank Table.

(b) Flammable liquids with flash points above 20 degrees F. to 73 degrees F. Flammable liquids with flash points above 20 degrees F. to 73 degrees F. and having vapor pressure (Reid[1] test) not over 16 pounds per square inch, absolute, at loo degrees F. other than those for which special requirements are prescribed in this Part, must be packaged in packagings of a design and constructed

of materials that will not react dangerously with or be decomposed by the chemical packed therein as follows (see paragraphs (c) through (i) of this section for high-pressure liquids and paragraph (m) of this section for flammable liquids which are also oxidizers, poison B liquids, organic peroxides or corrosive liquids):

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[1]ASTM Test D323

(1) Containers as specified in paragraph (a) of this section, except that openings greater than 2.3 inches in diameter in barrels and drums are authorized when permitted by the specification.

(2) Spec. 17E or 17H (Sections 178.116 or 178.118 of this subchapter). Metal drums (single-trip).

(3) Specification 10B (Sec. 178.156 of this subchapter). Wooden barrels or kegs. Authorized only for alcohol and alcohol-water-mixtures.

Note 1: Until further order of the Department, wooden whiskey barrels, properly recoopered, which comply with all the provisions of spec. 10B (Sec. 178.156 of this subchapter), are also authorized. Marking is required on the head of each container, by the reconditioner, by hot branding or legible stenciling, as follows: DOT-10B.

Name or symbol (letters) of reconditioner; this must be registered with the Associate Director for HMR and located just above, below, or following the mark DOT-10B.

Size of marking (minimum) $^{3}/_{4}$ inch high.

(4) Spec. 12B (Sec. 178.205 of this subchapter). Fiberboard boxes with inside containers which must be glass, earthenware, polyethylene (bags are not authorized), or metal, not over 1 gallon each. Packages containing inside glass or earthenware containers must not contain more than 4 such inside containers if their capacity is

greater than 5 pints each. Polyethylene containers are authorized only for materials that will not react with or cause decomposition of the plastic.

Note 1: Until further order of the Department, fiberboard boxes, Spec. 12B (Sec. 178.205-26(a) of this subchapter), with one inside rectangular metal can, spec. 2F (Sec. 178.25 of this subchapter), not to exceed 5 gallons capacity, are authorized. Gross weight of completed package not over 65 pounds.

(5) Spec. 12E (Sec. 178.208 of this subchapter). Fiberboard box with 1 or 2 rectangular metal inside containers of not over 5 gallons capacity each.

(6) Specification 57 (Sec. 178.253 of this subchapter). Steel portable tank. Authorized for transportation by water when having a minimum design pressure of 9 psig and equipped in accordance

with Sec. 178.253-4, except that frangible devices are not authorized. Also, for water transportation, no pressure relief device may open at less than 5 psig. Authorized for liquids with flash points above 20 degrees F. and a vapor pressure not over 16 psia at 100 degrees F.

(7) Specification 37P (Sec. 178.133 of this subchapter). Steel drums with polyethylene liner (non-reusable container). Authorized only for materials that will not react with polyethylene and result in container failure. Not authorized for transportation by air.

(8) Specification 6D or 37M (non-reusable container) (Sections 178.102, 178.134 of this subchapter). Cylindrical steel overpack with an inside specification 2S or 2SL (Sections 178.35, 178.35a of this subchapter) polyethylene container. Authorized only for materials that will not react with polyethylene and result in container failure.

(9) Spec. 21P (Sec. 178.225 of this subchapter). Fiber drum overpack with inside spec. 2S or 2SL (Sections 178.35 or 178.35a of this subchapter) polyethylene container. Authorized only for materials that will not react with polyethylene and result in container failure.

(10) Specification 37D (Sec. 178.137 of this subchapter). Non-reusable steel drum authorized only for a material not exceeding a weight of 10 pounds per gallon. For a material weighing more than 10 pounds per gallon but not exceeding a weight of 12 pounds per gallon, drums made of not less than 21-guage body and 20-guage heads must be used.

(c) Flammable liquids for which other special packing requirements are not prescribed. Flammable liquids for which other special packing requirements are not prescribed in this part, must be shipped, depending upon their Reid[1] vapor pressures as prescribed in paragraphs (d) to (i) of

this section.

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[1]ASTM Test D323.

(d) When the vapor pressure does not exceed 16 pounds per square inch, absolute, at 100 degrees F. When the vapor pressure does not exceed 16 pounds per square inch, absolute, at 100 degrees F., flammable liquids must be packed as prescribed in paragraphs (a) and (b) of this section.

(e) When the vapor pressure exceeds 16 pounds per square inch, absolute, at 100 degrees F. When the vapor pressure exceeds 16 pounds per square inch, absolute, at 100 degrees F., but does not exceed 27 pounds per square inch, absolute, at 100 degrees F., flammable liquids must be packed in specification containers as follows:

(1) As prescribed in paragraphs (a) (1) to (11) of this section, except spec. 17E (Sec. 178. 116 of this subchapter). Bung labels required,

for metal barrels and drums, as prescribed in paragraph (i) of this section

(2) Specification 103[2], 103W, 103ALW, 103-DW, 104,[2] 104W, 105A100,[2] 105A100ALW, 105A-100W, 106A500X, 106A800XNC, 106A800NCI,[2] 109A-100ALW, 109A300W, 110A500W, 111A60ALW1, 111A60F1, 111A60W1, 111A100W3, 111A100W4, 111-A100W6, 112A200W, 112A400F, 114A340W, 115A60-W1, 115A60W6, 115A60ALW, ARA-III,[2] ARA-IV,[2] or ARA-IV-A,[2] (Sections 179.100, 179.101, 179.-200, 179.201, 179.220, 179.221, 179.300, 179.301 of this subchapter). Tank cars. Any car having an expansion dome must be equipped with a manway closure identification mark, and dome placards as described in paragraphs (f)(4), (g), and (h) of this section. Openings in tank heads to facilitate application of lining are authorized on tank cars constructed before January 1, 1975. These openings must be closed in an approved (Sec. 179.3 of this subchapter) manner. (See note 1 of paragraph (f) (3) of this section).

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[2]Use of existing tank cars authorized, but new construction not authorized.

(3) Specification MC 304, MC 307, MC 330, or MC 331 (Sections 178.340, 178.342, 178.337 of this subchapter). Tank motor vehicles. Necessary interior cleaning of the tanks must be performed between changes in lading Each safety relief device must have a start-to-discharge pressure of not less than 25 p.s.i.g. Each tank must meet the following requirements as applicable:

(i) Bottom outlets on each specification MC 304 cargo tank must be equipped with valves conforming to the requirements of Sec. 178.342-5(a) of this subchapter: and

(ii) Bottom outlets on each specification MC 330 and MC 331 cargo tank must be equipped with valves conforming to the requirements of Sec. 178.

337-11(c) of this subchapter. Safety relief devices on these tanks must be in accordance with specification MC 331 (Sec. 178.337 of this subchapter) requirements.

(4) Spec. 51 (Sec. 178.245 of this subchapter). Portable tanks

(5) IM portable tanks, under conditions specified in the IM Tank Table.

)f) When the vapor pressure exceeds 27 pounds per square inch, absolute, at 100 degrees F. When the vapor pressure exceeds 27 pounds per square inch, absolure, at 100 degrees F., but does not exceed 40 pounds per square inch (See note 2), absolute, at 100 degrees F., flammable liquids must be packed in specification containers as follows:

(1) Spec. 5, 5A, or 5P (Sections 178.80, 178.-81, or 178.92 of this subchapter). Metal barrels

or drums, with openings not exceeding 2.3 inches in diameter. Bung labels required as prescribed in paragraph (i) of this section.

(2) Cylinders as prescribed for any compressed gas except acetylene.

(3) Specification 105A100,[2] 105A100ALW, 105A100W, 108A500X, 106A800XNC, 106A800NCI,[2] 109A100ALW, 109A300W, 110A500W, 111A100W4, 112A200W, 112A400F, 114A340W, or ARA-IV-A[2] (Sec.-179.30, 179.100, 179.101, 179.200, 179.201, 179.300, 179.301 of this subchapter), (see Note 1 of this paragraph). Tank cars. Specification 104,[2] 104W, 111A100W3, and ARA-IV[2] (Sections 179.200, 179.201 of this subchapter), tank cars are authorized under the conditions prescribed in paragraphs (f)(4), (g), and (h) of this section and Note 3 of this paragraph. Openings in tank heads to facilitate application of lining are authorized on tank cars constructed before January 1, 1975. These openings must be closed in an approved (Sec. 179.3 of

this subchapter) manner.

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[2]Use of existing tank cars authorized, but new construction not authorized.

Note 1: Tanks built in compliance with American Railway Association specifications for class IV-A[2] tank cars authorized for use effective October 1, 1925, may be continued in service for the transportation of ethyl chloride and other liquids which do not have a vapor pressure exceeding 28 pounds per square inch, gauge pressure, at 100 degrees F., provided there is stenciled on each side of the tank immediately below the valve protecting housing the words "Liquids having vapor pressure exceeding 28 pounds per square inch at 100 degrees F. must not be loaded into this tank" in letters and figures at least 1 inch high. These tank cars must be retested as prescribed in current spec. 105A100W except that safety valves must open at pressure not exceeding 35 pounds, and be vapor tight at 28 pounds per square inch.

Note 2: When the vapor pressure exceeds 40 pounds per square inch, absolute, at 100 degrees F., these flammable liquids are classed as flammable compressed gases and must be described, packed, and shipped as prescribed for such articles.

Note 3: Spec. 104[2] or 104-W or ARA-IV[2] tank cars are authorized provided that they are equipped with approved fittings designed to provide for the loading, unloading, gauging, sampling, and taking temperature of the contents without removing the manway closure; that safety valves are set to open at pressure of 35 pounds, (with a tolerance of plus or minus 3 pounds), and are vapor tight at 28 pounds per square inch gauge pressure; that bottom discharge outlets are of the same type as authorized for specification 104[2] or 104-W tank cars; and that there is stenciled on each side of the tank above the specification mark, in letters and figures at least 1 inch high, "For vapor pressures not exceeding 40 pounds per square

inch, absolute, at 100 degrees F." Because of the present emergency and until further order of the Department, spec. ICC-104[2] or 104-W tank cars, equipped with safety valves set to open at pressure of 35 pounds (with a tolerance of plus or minus 3 pounds) and which are vapor tight at 28 pounds per square inch, gauge pressure, are authorized provided that they are stenciled as required above.

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[2]Use of existing tank cars authorized, but new construction not authorized.

(4) Specification 103,[2] 103W, 103ALW, 104,[2] 111A60ALW1, 111A60F1, 111A60W1, 115A60W1, 115A60W6, 115A60ALW, ARA-III,[2] or ARA-IV[2] (Sections 179.200, 179.201, 179.220, 179.221 of this subchapter). Tank cars. Each car must have its manway closure equipped with approved safeguards making the removal of the closure from the manway opening practically impossible while the car interior is subjected to vapor pressure of lading.

The car must be stenciled on each side of the dome in line with the ladders, and in a color contrasting to the color of the dome, with identification marks as prescribed in paragraph (g) of this section.

---

[2]Use of existing tank cars authorized, but new construction not authorized.

(5) Specification MC 304, MC 307, MC 330,[3] or MC 331[3] (Sections 178.340, 178.342, 178.337 or this subchapter). Tank motor vehicles. Bottom outlets on specification MC 304 cargo tanks must be equipped with valves conforming with Sec. 178.-342-5(a) of this subchapter. Bottom outlets on specification MC 330 and MC 331 cargo tanks must be equipped with valves conforming with Sec. 178.-337-11(c) of this subchapter.

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[3]In addition to other requirements of this section, necessary interior cleaning of the tanks

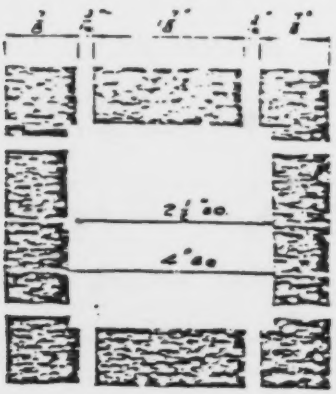
must be performed between changes in lading. Safety relief devices must be in accordance with specification MC 331, (Sec. 178.337).

(6) Spec. 51 (Sec. 178.245 of this subchapter). Portable tanks.

(7) IM portable tanks, under conditions specified in the IM Tank Table.

(g) Manhole closure identification mark.

(Reduced size)



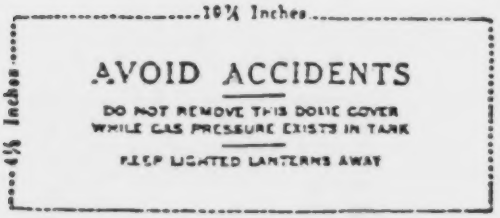
(h) Dome placards. Specification 103,[2] 103-ALW, 103W, 104,[2] 104W, 111A60ALW1, 111A60F1, 111-A60W1, 115A60W1, 115A60W6, 115A60ALW, ARA-

III,[2] or ARA-IV[2] (Sections 179.200, 179.201, 179.220, 179.221 of this subchapter). Tank cars. Each car loaded with any material described in paragraph (e) or (f) of this section must, in addition to the "Flammable" placards, be protected by special dome placards, at least 4 and one-eighth by 10 and seven-eights inches, with legible wording as follows:

DOME PLACARD

(Reduced Size)

(Black printing on white)



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[2]Use of existing tank cars authorized, but new construction not authorized.

Note 1: For tank cars equipped with both inner

and outer manhole covers, and when removal of inner cover is not necessary to unload the car, the word "inner" may be substituted for the word "this" in the dome placard.

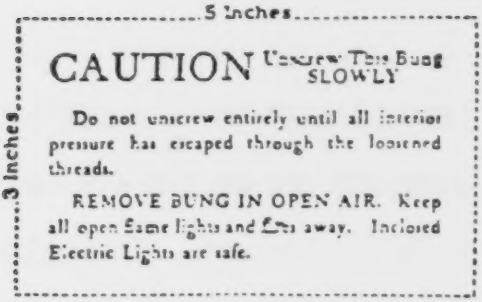
(l) Dome placard must be applied one on each side of dome and one on the top near the manhole in line with the ladders. Dome placards may be of white paper securely pasted to the dome, or of strong tag board for use in suitable holders; or the wording of the dome placard may be stenciled on the dome of car and remain thereon as long as it is used in the service which requires these special placards.

(i) Bung label. A flammable liquid as described in paragraph (e) or (f) of this section, shipped in a metal drum or barrel, in addition to the FLAMMABLE LIQUID label, must be labeled near the bung with a white rectangular label or tag measuring 5 by 3 inches, bearing the wording as displayed below:

BUNG LABEL

(Reduced Size)

(Black printing on white)



(j) Viscous flammable liquids. Flammable liquids which are viscous as defined in Sec. 171.8 of this subchapter must be shipped in specification packagings as prescribed in paragraph (k) or (l) of this section.

(k) Viscous flammable liquids having a vapor pressure which does not exceed 16 pounds per square inch, absolute, at 100 degrees F. (See paragraphs (c) to (i) of this section for higher pressure liquids) must be prepared for shipment in containers as follows:

(1) As prescribed in paragraphs (a) or (b) of this section, irrespective of flash point.

(2) Specification 6B, or 6C (Sections 178.98, 179.99 of this subchapter). Metal barrels or drums.

(3) Specification 37A or 37B (Sections 178.131, 178.132 of this subchapter). Metal drums (single-trip) not over 5 gallons with welded seams. Not authorized for transportation by air.

(4) (Reserved)

(1) Viscous flammable liquids with flash point above 20 degrees F. to 73 degrees F. and having a vapor pressure which does not exceed 18 pounds per square inch, absolute, at 100 degrees F. Viscous flammable liquids with flash point above 20 degrees F. to 73 degrees F. and having a vapor pressure which does not exceed 18 pounds per square inch, absolute, at 100 degrees F. must be

packaged as follows:

(1) As prescribed in paragraphs (e) to (i) of this section.

(2) Spec. 17E or 17H (Sections 178.116 or 178.-118 of this subchapter). Metal drums (single-trip).

(m) Flammable liquids which are also organic peroxides, oxidizers, corrosive liquids or poison B liquids. A flammable liquid which is also an organic peroxide, oxidizer, corrosive liquid, or poison B liquid must be packed as follows:

(1) Specification 1A, 1D, 1EX (single-trip) or 1M (Sections 178.1, 178.4, 178.6, 178.17 of this subchapter). Glass carboys in boxes, plywood drums, or expanded polystyrene packagings. Rated capacity may not exceed 5 gallons for Specification 1A. Not authorized for transportation by aircraft.

(2) Specification 15A, 15B, 15C, 16A, 19A, or 19B (Sections 178.168, 178.169, 178.170, 178.185, 178.190, 178.191, of this subchapter). Wooden boxes with inside containers which must be glass, earthenware, or polyethylene not over 1 gallon capacity each. Inside containers must be cushioned with noncombustible packaging material in sufficient quantity to absorb the contents of the inner container.

(3) Spec. 12B (Section 178.205 of this subchapter). Fiberboard boxes with inside containers which must be glass or earthenware, not over 1 quart each, cushioned with incombustible packing material in sufficient quantity to absorb the contents of the inner container.

(4) Specification 5, 5A, 5B, 5C, 5P, 17C (single-trip), or 17E (single-trip) (Sections 178.80, 178.81, 178.82, 178.83, 178.92, 178.115, 178.116 of this subchapter). Metal barrels or drums. Removeable head packagings over 16 gallons capacity

are not authorized. Authorized only for materials which will not react dangerously with the drum metal, or be decomposed by contact with it.

(5) Specification 37P (Sec. 178.133 of this subchapter). Steel drums, not over 15 gallons capacity, with polyethylene liner (non-reusable container). Drums exceeding one gallon capacity must be constructed of at least 24-gauge metal. Authorized only for materials that will not react with polyethylene and result in container failure. Not authorized for transportation by air.

(6) Specification 12B (Sec. 178.205 of this subchapter). Fiberboard boxes with inside Specification 2E (Sec. 178.24a of this subchapter) polyethylene bottles not over 1-gallon capacity each. Not more than four 1-gallon polyethylene bottles shall be packed in one outside fiberboard box. Authorized only for material which will not react dangerously with or be decomposed by contact with polyethylene.

(7) Spec. 12B (Sec. 178.205 of this subchapter). Fiberboard boxes with one inside polyethylene bottle not over 5-gallons capacity, as specified by Sec. 178.205-34 of this subchapter. Authorized only for material which will not react dangerously with or cause decomposition of polyethylene.

(8) Specification 12P (Sec. 178.211 of this subchapter). Fiberboard box with one inside specification 2U (Sec. 178.24 of this subchapter) polyethylene container of not over 6-gallon capacity, or two inside specification 2U polyethylene containers of not over 2½ gallon capacity each. Authorized only for material which will not react with or cause decomposition of polyethylene. Not authorized for transportation by air.

(9) Specification steel or nickel cylinders as prescribed for any compressed gas except acetylene. All cylinder valves must be protected by one of the methods described in Sec. 173.301 (g) (1),

(2), or (3) of this part. See Sec. 173.34 (e)-(16).

(10) Specification MC 303 or MC 304: Tank motor vehicle meeting Sec. 178.343-2(c) of this subchapter. If the cargo tank is constructed with bottom outlets, they must meet Sec. 178.342-5(a) of this subchapter. Not authorized for flammable liquids which are also organic peroxides. MC 303 not authorized for transportation by water.

(11) Specification MC 305, MC 306, or MC 307 (Sections 178.340, 178.341, 178.342 of this subchapter). Tank motor vehicles meeting Sec. 178.-343-2(c) of this subchapter. Not authorized for flammable liquids which are also organic peroxides. MC 305 and MC 306 not authorized for transportation by water.

(12) Specification MC 310, MC 311, or MC 312 (Sections 178.340, 178.343 of this subchapter). Tank motor vehicles. If the cargo tank is con-

structed with bottom outlets, they must meet Sections 178.342-5(a) and 178.343-5 of this subchapter. Not authorized for flammable liquids which are also organic peroxides.

(13) Specification 103AW, 103ALW, 103A-ALW, 1o3ANW, 103BW, 103CW, 103DW, 103EW, 103W, 104W, 105A100W, 111A60ALW1, 111A60ALW2, 111A60W1, 111A60W2, 111A60W5, 111A100F2, 111A100W3, 111A100W6, 115A60W6, or AAR206W (Sections 179.-200, 179.201, 179.220 of this subchapter). Tank cars. All special requirements for tank cars according to flash point, vapor pressure, and viscosity, in paragraphs (a) through (l) of this section apply. Not authorized for flammable liquids which are also organic peroxides.

(14) Specification 112A200W or 114A340W (Sections 179.100, 179.101 of this subchapter). Tank cars. Authorized only for propylene oxide except 112A200W also authorized for acrylonitrile and dichlorobutene.

(15) (Reserved).

(16) Specification 6D or 37M (non-reusable container) (Sections 178.102, 178.134 of this subchapter). Cylindrical steel overpacks with an inside specification 2S or 2SL (Sections 178.35, 178.35a of this subchapter) polyethylene container. Authorized only for materials that will not react with polyethylene and result in container failure.

Note 1: Authorized only on an interim basis pending the Department's decision on use of bottom outlets for tank cars containing hazardous materials.

(18) IM portable tanks, under the conditions specified in the IM Tank Table. Not authorized for flammable liquids which are also organic peroxides or oxidizers.

(49 U.S.C. 1803, 1804, 1808; 49 CFR 1.53 and App. A to Part 1)

(29 FR 18700, Dec. 29, 1964. Redesignated at 32 FR 5606, April 5, 1967).

EDITORIAL NOTE: For Federal Register citations affecting Sec. 173.119, see the list of CFR Sections Affected appearing in the Finding Aids section of this volume.

No. 83-1929

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES GREGORY SMITH AND ROBERT SHINGLE SPEIR,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1929

JAMES GREGORY SMITH AND ROBERT SHINGLE SPEIR,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that a large quantity of marijuana seized from petitioners' aircraft at the time of their arrests should have been supressed as the fruit of the monitoring by government agents of an electronic tracking device installed in their aircraft pursuant to a federal court order because (1) the application for the installation order was submitted by a state law enforcement officer, and (2) the affidavit supporting the installation order allegedly failed to establish probable cause.

1. Following a bench trial on stipulated facts in the United States District Court for the Eastern District of Texas, petitioners were convicted of importation of marijuana, in violation of 21 U.S.C. 952(a) and 960, possession of marijuana with intent to distribute it, in violation of 21

U.S.C. 841(a)(1), transportation of a hazardous material (gasoline) in air commerce, in violation of 49 U.S.C. 1472(h), and conspiracy to commit the above offenses, in violation of 18 U.S.C. 371. Petitioners were each sentenced to concurrent terms of five years' imprisonment on each count to be followed by a two-year special parole term. The court of appeals affirmed (Pet. App. A1).

The record in this case shows that on May 17, 1982, Terry Lankford, a Texas narcotics investigator working with United States Customs officers, applied before a federal magistrate in the Eastern District of Texas for a court order authorizing the installation of an electronic tracking device, or transponder, in an aircraft jointly leased by petitioners (Pet. App. C4, E1-E8). In his affidavit in support of the order, Lankford stated that petitioner Smith was the subject of a separate state narcotics investigation and was known to Lankford as a narcotics smuggler who used aircraft in his smuggling operation (*id.* at E4-E5). The affidavit further stated that Smith owned another aircraft and was using a fictitious company as a front for his operations — a common practice among narcotics smugglers (*id.* at E5-E6). In addition, Smith had filed a false flight plan on May 16, 1982, giving a destination in Texas; shortly thereafter, Smith's companion had been heard checking weather conditions for a flight over international waters to the Virgin Islands (*id.* at E6-E7). Lankford also had received information that Smith's plane had been stripped of its passenger seats, apparently to make room for the contraband, and that an additional fuel tank with a capacity of 200 gallons had been installed in the aircraft to increase its range (*id.* at E3-E4).

On the basis of this information a federal magistrate issued an order authorizing the installation of a tracking device inside petitioners' aircraft (Pet. App. E9-E10). After installation, Customs officers used the transponder to track

the aircraft, which, when seized after its return to this country on May 18, 1982, was found to contain more than 900 pounds of marijuana (Pet. App. C3-C4).

2. Petitioners claim that the marijuana seized from their aircraft should have been suppressed as the fruit of an allegedly invalid order authorizing the installation of the transponder in their aircraft. This claim is without merit for a number of reasons.

To begin with, we note that petitioners' invocation of the exclusionary rule in the circumstances of this case would appear to be foreclosed by this Court's recent decision in *United States* v. *Leon,* No. 82-1771 (July 5, 1984), establishing an exception to the exclusionary rule where the police have reasonably relied on a warrant issued by a detached and neutral magistrate but later found to be defective. Even if there were merit to petitioners' complaints regarding the installation order (and, as we show below, there is none), it is clear that the law enforcement officers in this case acted in objective good faith in seeking the order and in relying on the magistrate's determination of probable cause. Thus, application of the exclusionary rule is inappropriate in this case.

Beyond this, as the Court's recent decisions make clear, the marijuana is not a suppressible fruit of any defect in the installation order. Even if the order were invalid, the evidence was not the fruit of any illegality associated with the installation of the beeper. A warrant was required only because the officers entered the aircraft to install the transponder, but petitioners do not seek suppression of any evidence discovered during that entry. Compare *Segura* v. *United States,* No. 82-5298 (July 5, 1984). The mere act of installing the transponder, without more, did not infringe any of petitioners' Fourth Amendment interests. See *United States* v. *Karo,* No. 83-850 (July 3, 1984), slip op.

5-7. Thus, there can be no dispute that it was the monitoring of the transponder by Customs officers to trace the public movements of the aircraft that resulted in the seizure of the marijuana that petitioners seek to suppress. But, as this Court held in *United States* v. *Knotts*, 460 U.S. 276 (1983), and reiterated in *Karo*, the monitoring of a tracking device to trace the public movements of a conveyance is not a search or seizure within the meaning of the Fourth Amendment. Because the marijuana is the fruit of the lawful monitoring and not of any leads gained while the officers were inside the aircraft, petitioners may not seek suppression on the basis of any defect in the installation order.

3. In any event, petitioners' contentions do not warrant review on their merits.

a. Petitioners contend (Pet. 6) that the installation order did not comply with Rule 41(a) of the Federal Rules of Criminal Procedure because the order was issued upon the application of Lankford, a state police officer, rather than "upon request of a federal law enforcement officer or an attorney for the government." Nothing in the installation order, however, suggests that it was issued pursuant to Rule 41, and petitioners cite no support for the proposition that installation orders for electronic tracking devices may be authorized only in conformity with the requirements of that rule.[1] We believe that the issuance of an installation order would be authorized under the All Writs Act, 28 U.S.C. 1651, and under the inherent power of the courts to issue warrants in circumstances conforming to the Fourth Amendment.

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[1]We note that petitioners did not raise this contention in the district court and thus, although they presented the issue in the court of appeals, appear to have failed to preserve the issue for review. See *United States* v. *Jackson*, 700 F.2d 181, 190 (5th Cir. 1983), cert. denied, No. 82-6963 (Oct. 3, 1983); *United States* v. *Davis*, 656 F.2d 153, 155 (5th Cir.), cert. denied, 456 U.S. 930 (1981).

Moreover, petitioners have failed to demonstrate any prejudice from the alleged noncompliance with Rule 41. This Court has noted that suppression is not invariably required for every insubstantial statutory violation, even where the statute does include an exclusionary remedy. See *United States* v. *Donovan*, 429 U.S. 413, 432-434 (1977); *United States* v. *Chavez*, 416 U.S. 562, 574-575 (1974); *United States* v. *Giordano*, 416 U.S. 505, 527 (1974). As the Second Circuit remarked, in determining whether inconsequential violations of Fed. R. Crim. P. 41(c) called for suppression, "courts should be wary in extending the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude." *United States* v. *Burke*, 517 F.2d 377, 386 (1975) (footnote omitted). The court in *Burke* concluded that evidence should not be suppressed unless the defendant was "prejudiced" by the infraction in the sense that the search would not otherwise have occurred or would not have been so abrasive if the rule had been followed, or where there is evidence of an "intentional and deliberate disregard" of the rule (*id.* at 386-387).[2] None of those factors is present here.

b. Petitioners also argue (Pet. 6-16) that Officer Lankford's affidavit failed to establish probable cause to support the issuance of the installation order. This claim is without merit.[3]

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[2]The *Burke* test has been adopted by most of the other circuits. See, *e.g.*, *United States* v. *Marx*, 635 F.2d 436, 441 (5th Cir. 1981); *United States* v. *Searp*, 586 F.2d 1117, 1124-1125 (6th Cir. 1978), cert. denied, 440 U.S. 921 (1979); *United States* v. *Mendel*, 578 F.2d 668, 673 (7th Cir.), cert. denied, 439 U.S. 964 (1978); *United States* v. *Gitcho*, 601 F.2d 369, 372 (8th Cir.), cert. denied, 444 U.S. 871 (1979); *United States* v. *Vasser*, 648 F.2d 507, 510-511 (9th Cir. 1980), cert. denied, 450 U.S. 928 (1981); *United States* v. *Pennington*, 635 F.2d 1387, 1389-1390 (10th Cir. 1980), cert. denied, 451 U.S. 938 (1981).

[3]We note that petitioners' reliance (Pet. 15) on *United States* v. *Butts*, 710 F.2d 1139 (5th Cir. 1983), is misplaced. The panel opinion in

The affidavit supporting the installation order was based upon Officer Lankford's knowledge of petitioner Smith's prior involvement in narcotics activities, including Smith's use of a front to conceal those activities; on Smith's filing a false flight plan while his companion checked the weather conditions for a flight outside the United States; and on information that the passenger seats had been removed from Smith's airplane and that an additional fuel tank had been installed. The affidavit thus provided probable cause to believe that the aircraft was about to be used for a smuggling operation.

To the extent that Lankford relied upon another source for information about the condition of the interior of the aircraft, it is apparent that Lankford's informant was a citizen, or eye-witness, informant working at the Corpus Christi International Airport (see Pet. App. E3-E4). Such citizen-informants are presumptively reliable and their information need not be corroborated to the same extent, if at all, as that from a professional, or criminal, informant. See, *e.g.*, *United States* v. *Fooladi*, 703 F.2d 180, 182-183 (5th Cir. 1983); *United States* v. *Melvin*, 596 F.2d 492, 496-497 (1st Cir.), cert. denied, 444 U.S. 837 (1979); 1 W. LaFave, *Search and Seizure* § 3.4(a), at 592 (1978). Here, the information from the citizen-informant that the seats had been removed from the aircraft and an extra fuel tank installed suggested that Smith may have been involved in a smuggling venture. That information, coupled with the information that Smith was a known smuggler who had filed a false flight plan and whose companion had inquired about weather conditions for an overseas flight, provided probable cause to justify entry into the aircraft to install the transponder.

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that case was vacated and subsequently overruled by the en banc Fifth Circuit. *United States* v. *Butts*, 729 F.2d 1514 (1984), petition for cert. pending, No. 84-111.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1984